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IN THE

Supreme Court of the United States

October Term, 1958.

No. 147

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958. No.

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,

Petitioner

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Irene Hill, Administratrix of the Estate of Benjamin Hill, Deceased, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on February 6, 1958, affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 12,329.

OPINIONS OF THE COURTS BELOW.

The judgment of the District Court for the Eastern District of Pennsylvania is unreported, and is printed in Appellant's Appendix in the court below, p. 12a. The opinion of the Court of Appeals is reported at 251 F. 2d 655 (infra, pp. 15-16).[1]

1. Because the opinion below stated only that it follows two prior opinions, the pertinent section of the more recent, *Curtis v. Garcia*, 241 F. 2d 30, is also appended (infra, pp. 17-21).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 6, 1958 (infra, p. 16). An order extending time to file petition for writ of certiorari to and including July 5, 1958 was granted by this court on March 17, 1958. The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

Where a longshoreman was killed as a result of a maritime tort aboard respondent's vessel in navigable waters of a state, is the state rule of contributory negligence a complete bar to an action for wrongful death, or does the maritime doctrine of comparative negligence apply?

STATEMENT OF THE CASE.

Petitioner's decedent, a longshoreman employed aboard respondent's vessel, S.S. "Yaka," in the navigable waters of Pennsylvania, was killed as result of a maritime tort, respondent's failure to provide a safe place to work. The jury found respondent negligent and decedent contributorily negligent to the extent of 40%. In the wrongful death action, damages were found in favor of petitioner, which, reduced by 40%, amounted to $27,000.00.

The trial judge set aside the verdict as reduced by the comparative negligence rule, and entered judgment for the defendant on the ground that the state rule of contributory negligence barred the wrongful death action completely.

The Court of Appeals affirmed that judgment of the trial judge.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision of the Court Below Conflicts With the Rulings of This Court as to the Supremacy of the Federal Maritime Law and Its Application of the Comparative Negligence Rule, and With the Decisions of the Courts of Appeals for the First and Second Circuits, Which Hold That in an Action for Wrongful Death Caused by Maritime Tort, the Comparative Negligence Rule of the Maritime Law Applies, to the Exclusion of the State Rule of Contributory Negligence.

The decision of the court below is based upon its prior holdings in *Curtis v. Garcia*, 241 F. 2d 30, and *Klingseisen v. Costanzo Transp. Co.*, 101 F. 2d 902. These decisions violate the precepts of this court, and conflict with the well-reasoned decisions of the First and Second Circuits, concerning the supremacy of the federal maritime law and the limitations upon state intrusion into substantive admiralty doctrine, even where a state statute may be applied in aid of the maritime law.

The cause of action herein was a maritime tort, subject in all aspects to the maritime law. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208. This body of law is subject solely to federal control, and is the independent and supreme law of the United States. *Panama R. Co. v. Johnson*, 264 U. S. 375, 386, 68 L. Ed. 748, 752.

In its desire to do equity and complete justice, under varying circumstances and in different localities, in maritime causes of action, this court has given effect to specific local remedies where they may apply. But, such effect has been specifically limited to the extent where the local remedies do not conflict with matters upon which the general maritime law has itself spoken or provided. If applied, the local remedy becomes maritime in nature, and

a part of the maritime law. Thereafter, it must be enforced according to maritime rules and principles. The feature of the maritime law sought always to be maintained is that it must operate uniformly throughout the whole country. *The Lottawanna,* 21 Wall. 558, 22 L. Ed. 654; *The J. E. Rumbell,* 148 U. S. 1, 37 L. Ed. 345.

It was in accordance with this desire of the maritime law to do complete justice that this court has granted to maritime causes of action the state-created remedies for wrongful death. In *Just v. Chambers,* 312 U. S. 383, 388, 85 L. Ed. 903, 907, this court granted such a remedy, specifying, however, that the state law may be applied *only so far as it does not conflict with the characteristic features of the maritime law* and its uniformity and consistency. It was made clear that the borrowed rule or statute brings with it only so much effect as does not infringe upon maritime principles. For, the state provision, upon application in the maritime law, becomes itself a part of and supplement to that law, and subject to all of its principles and operative rules. *Panama R. Co. v. Johnson, supra,* U. S. at 388-9, L. Ed. at 753-4; *The Arizona v. Anelich,* 298 U. S. 110, 119-20, 80 L. Ed. 1075, 1089.

This rule applies to every aspect of the maritime cause of action where it enforces a state-created right or remedy. Thus, the exclusiveness of the admiralty jurisdiction prohibits a state rule from infringing upon the maritime principles concerning the measure of recovery of indemnity for personal injury. It being apparent that such would change a settled maritime law and destroy the required uniformity, such effect is prohibited. *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 216, 61 L. Ed. 1086, 1098. "Under the doctrine . . . no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law." *Chelen-*

tis v. Luckenbach S. S. Co., 247 U. S. 372, 382, 62 L. Ed. 1171, 1176.

The same principle also applies in maritime causes of action sounding in contract. In *The J. E. Rumbell*, 148 U. S. 1, 12, 17, 37 L. Ed. 345, 347, 349, this court applied, in a maritime cause of action, a lien right created by a state statute, but solely according to maritime rules of priority. In refusing to follow the priority set by the state creating the right, this court held that admiralty courts must enforce the state statute according to maritime rules, and that the decisions of the highest court of the state are immaterial. Similarly, see *Union Fish Co. v. Erickson*, 248 U. S. 308, 314, 63 L. Ed. 261, 263.

The Conflict with the Supreme Court: Pope & Talbot, Inc. v. Hawn, 346 U. S. 406.

The specific issue under consideration was reviewed by this court in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 98 L. Ed. 143. The question of the application of the state bar of contributory negligence in a maritime cause of action was directly in issue. After observing that "the harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice", this court refused to apply that "discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." (U. S. at 408-9, L. Ed. at 150-1.) See *The Max Morris*, 137 U. S. 1, 34 L. Ed. 586. The court continued (U. S. at 409, L. Ed. at 151):

> "(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he

was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. *Consequently, the basis of Hawn's action is a maritime tort,* a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features. . . .' *Panama R. Co. v. Johnson,* 264 U. S. 375, 386, 68 L. Ed. 748, 752, 44 S. Ct. 391. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. *Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling.* While states may sometimes *supplement* federal maritime policies, *a state may not deprive a person of any substantial admiralty rights* as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. . . ." (Emphasis supplied)

This court thus made it clear that the right which was being enforced, the liability being adjudicated and the duty whose breach was complained of were rooted in the maritime law, and had to be determined in accordance therewith. That is, the right or cause of action was *the negligence or unseaworthiness,* which are maritime in nature as are all defenses thereto. Contributory negligence, thus, going to the *maritime right,* is applicable only according to maritime principles, *and its application must be the same, whether the victim survived or not.* For, this concept affects only the *wrong* committed and not the *result* of that wrong, or its *remedy,* or whether the victim survived.

This court has left no doubt that only a *remedy* created by the state can be borrowed, and not a *right.* The Judiciary Act of 1789, Sec. 9, now Judicial Code, 28 U. S. C. 1333, saves to suitors only common law "remedies".

Therefore, in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383-4, 62 L. Ed. 1171, 1176, this court said:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate *remedy*, recognized at common-law . . ." (Emphasis supplied.)

In recognizing the power of the maritime law to enforce a death claim by virtue of a state statute, this court has made it clear that the power arises in the "saving to suitors" clause, which relates only to *remedy*.[2] Just as in *Chelentis*, the plaintiff may not, in a "saving" case, choose to measure liability by common-law standards, neither can the defendant so measure plaintiff's contributory negligence.

The court below in the instant case, and in *Curtis v. Garcia*, 241 F. 2d 30, failed to apply the principles so expressed by this court. It failed to give heed to the precept that the right which is the cause of action is for unseaworthiness and negligence (and not the power or means to recover for personal injury or death); and that this right is rooted in maritime law. It ignored the recognition by this court that even if plaintiff "were seeking to enforce a state created remedy for this right, federal maritime law would be controlling." Further, the court below did not recognize that in enforcing state death statutes, this court has specified that it is only borrowing a *remedy*, and not a right; for the right already exists in maritime law, and the Judicial Code empowers the federal court only to use the state *remedy*.

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2. This court has maintained, also, that the presence or lack of power to sue for wrongful death is a question of survivorship of action and not of the existence of a substantive right or liability, and is a purely *remedial* concept. Just v. Chambers, 312 U. S. 383, 85 L. Ed. 903; Cox v. Roth, 348 U. S. 207, 99 L. Ed. 260.

Nevertheless, the court below insists that the right is not maritime, but was a creature of the state legislature.[3] In *Curtis*, the Court of Appeals stated (p. 35) that it recognized that the opposite opinion was expressed by the First Circuit in *O'Leary v. United States Lines Company*,[4] but stated its complete disagreement.

The Conflict With the Courts of Appeals for the First and Second Circuits.

The Courts of Appeals for the First and Second Circuits are in full conflict with the Third Circuit upon the meaning of the *Hawn* decision, and the effect of contributory negligence in a maritime death action.

In *O'Leary v. United States Lines Co.* (1 Cir.), 215 F. 2d 708 (cert. den. 348 U. S. 939, 99 L. Ed. 735), a maritime cause of action for wrongful death occurring in Massachusetts waters, the court said that the *Hawn* decision settled all prior doubts as to the supremacy of the general maritime law over the state law in all aspects where it has spoken; that this court left no doubt that in a diversity action for injury to or death of a shore worker in navigable waters of a state, although the state death act may provide a remedy, all rights, including the effect of the victim's own negligence, are to be determined by the general maritime law. Pointing out that this court said that "even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling", Judge Woodbury continued (p. 711):

> ". . . Indeed, in our opinion it would be incongruous to hold, in conformity with Pope & Talbot, Inc. v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate

3. It will later be shown that the Supreme Court of Pennsylvania disagrees with this application of the Pennsylvania statute.

4. Discussed infra.

consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S. S. Co., . . . the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important."

More recently, the Second Circuit expressed complete agreement with the First Circuit and specific disagreement with the Third Circuit, upon this point. In *Halecki, Admx., v. United N. Y. & N. J. S. H. P. Association*, 251 F. 2d 708, Judge Hand said that before the *Hawn* decision, some courts had held that where a state death statute was applied, the state's bar of contributory negligence was effective. As example, the court cited cases upon which the Third Circuit relied in deciding *Curtis v. Garcia*. However, the *Hawn* case settled the question in holding that contributory negligence was not a bar to a maritime action, but only limited the damages. The opinion continues at p. 713:

". . . . and this we read to mean that *rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence* whether suit upon it is in the admiralty or in an action at law, state or federal." (Emphasis supplied.)

After quoting further from the *Hawn* opinion, the court held that the maritime death action was exempt from con-

tributory negligence as a bar. Judge Hand stated his agreement with the reasoning and interpretation by the First Circuit in the *O'Leary* case, and his disagreement with the *Curtis* decision of the Third Circuit.

The First, Second and Third Circuit Courts of Appeal concede the clear conflict that exists concerning this important aspect of the maritime law. Realizing the necessity for settlement of the issue, on June 9, 1958, this court granted certiorari in the *Halecki* case, where the question here at issue was presented. The irreconcilable conflict among the circuits, and the importance of the issue involved require a review by this court of the instant case.

II. In Subjecting the Action for Death by Maritime Tort to the Pennsylvania Contributory Negligence Bar, the Court Below Has Applied the Pennsylvania Death Statute in a Manner That Conflicts With the Interpretations by the Pennsylvania Supreme Court.

In holding that the Pennsylvania Wrongful Death Act[5] creates a right rather than a remedy, the Court of Appeals has decided an important state question in conflict with applicable state decisions, as well as with federal maritime decisions. The *Curtis* opinion is based upon the incorrect proposition that the Pennsylvania death statute raised a new right of action, as opposed to just affording a remedy for an already established right. By doing this, the court below arrived at the erroneous conclusion that the cause or right of action involved in the instant case is not rooted in the maritime law, but in the state statute, and on that basis, applied the state bar of contributory negligence.

The court below relied upon *Pezzulli v. D'Ambrosia*, 344 Pa. 643, at 647, 26 A. 2d 659, 661, where the Pennsylvania Supreme Court, discussing the Pennsylvania death act, had said:

> "This action '. . . represents a cause of action unknown to the common law.' . . ."

5. 12 Pa. Stat. Ann. 1601-4.

Therefore, the Court of Appeals held that the maritime law enforcing the statute is enforcing a right "rooted in state law."

In this application, the court below was misconstruing the language of the Pennsylvania Supreme Court. It is clear from a review of Pennsylvania decisions that the term "cause of action" was used to mean, not a legal right, but a *remedy*. Subsequent to *Pezzulli* and prior to the *Curtis* decision, the Pennsylvania Supreme Court, agreeing with the declaration by this court in the *Hawn* case, specifically stated that *the right of action arises in the negligent or wrongful act*, and the Pennsylvania Wrongful Death Act merely provided the remedy. Thus the words "cause of action" as referred to above, were intended to designate "remedy", and nothing more. In *Fisher v. Hill*, 368 Pa. 53, 81 A. 2d 860, plaintiff sued under the Pennsylvania death statute for damages for the death of a child, after having previously obtained a judgment under the same statute for his wife's death which had occurred in the same accident. The court held that since all claims under a single cause of action must be asserted in one suit, the second suit was barred by merger. The court said, 368 Pa. at 58-60:

> "While the *rights* of action conferred by these acts are sometimes referred to as *causes* of action, they really confer no more than rights to recover damages growing out of *a single cause of action, namely, the negligence of the defendant which caused the damages suffered.* The phrase 'cause of action' is not susceptible of any single definition to be applied in all types of cases. In Rooney v. Maczko, 315 Pa. 113, 117, 172 A. 151, this Court quoted with approval that portion of the opinion in U.S. v. Memphis Cotton Oil. Co., 288 U.S. 62, 67, 53 S. Ct. 278, where Mr. Justice Cardozo said: 'A "cause of action" may mean one thing for one purpose and something different for another. . . .

> At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed.'
>
> "In Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 A. 59, . . . This Court said at page 285: 'It, therefore, becomes necessary to determine what constitutes the cause of action in Pennsylvania.' Is it the violation of the duty which the defendant owes to exercise due care, or the damage which flows from the wrong? This court has defined it to be (Martin v. Pittsburgh Rys. Co., 227 Pa. 18), "*the negligent act* or acts which occasioned the injury." It "*is that which produces or effects* the results complained of": Noonan v. Pardee, 200 Pa. 474, 482. . . . *If the cause of action is the wrongful act, and we so hold, then all of the damages sustained thereby, whether to person or property,* are properly sought in one suit.'" (Emphasis supplied).

The court concluded that under the Pennsylvania Wrongful Death Act, as in tort law generally, the *cause of action is the negligent or wrongful act* of the defendant, and *not* the injury or death resulting therefrom. Similarly see *Simodejka v. Williams*, 360 Pa. 332, 62 A. 2d 17. Thus, it is the law of Pennsylvania, as expressed by its highest court, that in considering the wrongful death statute, reference to the substantive "right" or "cause" of action means the *violation of the duty*, and not the result thereof. The basic right or duty exists outside the statute, in the common law of negligence or, as here, in the maritime law.

This conclusion is not new in Pennsylvania, but has been repeatedly held where the specific problem has arisen.

In *Hill v. P.R.R.*, 178 Pa. 223, 35 Atl. 997, the court made it clear that whether the victim lives or dies, the cause or right of action is the same, but that "the remedy given to the widow by the (death act) was, of course, a new *remedy* which had no previous existence." (178 Pa. at 228.) Similarly, see *Hughes v. D. & H. Canal Co.*, 176 Pa. 254, 260, 35 Atl. 190.

The same question has also arisen in cases involving conflict of laws. In *Centofanti v. P.R.R.*, 244 Pa. 255, 261-2, 90 Atl. 558, the accident occurred in Pennsylvania, and the death in New Jersey. In determining the choice of law, the Supreme Court of Pennsylvania held that the cause of action was the tort, and not the death; that the "wrongful act . . . is 'unlawful violence or negligence' causing . . . death."

It is settled, therefore, that the Pennsylvania Wrongful Death Act creates no new cause or right of action, but provides a new *remedy*. Thus, in an action for damages for death caused by a maritime tort, the cause of action is the wrong committed, the negligence or unseaworthiness. A state-created *right* is not involved, and the maritime law is paramount. Under such circumstances, the state bar of contributory negligence is inapplicable.

It is submitted that in *Curtis v. Garcia*, and in the instant case relying thereon, the Court of Appeals for the Third Circuit misconstrued the Pennsylvania death statute, and, as a result thereof, improperly injected into a maritime right of action a state-created principle of liability, contrary not only to the federal law, but also to the decisions of the state itself.

Upon this ground alone, certiorari should be granted and the judgment reversed.

CONCLUSION.

The decision of the court below and those upon which it was based are in direct conflict with the principles of federal maritime law announced by this court. In this disagreement, the court below conflicts also with the decisions of the First and Second Circuits upon the specific point at issue. Further, in imposing upon the federal maritime law a substantive rule of Pennsylvania, the court below interpreted the Pennsylvania death act in a manner conflicting with the decisions of the Supreme Court of Pennsylvania.

These irreconcilable conflicts directly involve issues of national importance, and inhibit the uniform application of the federal maritime law in a situation that regularly arises throughout the nation. This court has recently granted certiorari in *Halecki, Admx., v. United N.Y. & N.J. S.H.P. Asso.*, where the instant issue is among those presented.

It is therefore respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,329

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,
Appellant

v.

WATERMAN STEAMSHIP CORPORATION.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued January 9, 1958

Before Maris, McLaughlin and Hastie, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 6, 1958)

PER CURIAM.

This case is squarely ruled against the appellant by our prior decisions in Klingseisen v. Costanzo Transp. Co., 1939, 101 F. 2d 902, and Curtis v. A. Garcia y Cia., 1957, 241 F. 2d 30. We are, however, urged by the appellant to overrule those cases and now hold that the admiralty doctrine of comparative negligence is to be applied in a suit under the Pennsylvania Wrongful Death Act

for the death of a longshoreman on board a vessel in the port of Philadelphia instead of the Pennsylvania contributory negligence rule. We are satisfied, however, that the cases cited were correctly decided and we will accordingly follow and apply the rule laid down in them.

The judgment of the district court will be affirmed.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest;

Ida O. Creskoff
Clerk

February 6, 1958.

MARGARET JEAN CURTIS, ADMINISTRATRIX D. B. N. OF THE ESTATE OF WILLIAM THOMAS, DECEASED, APPELLANT,

v.

A. GARCIA Y CIA., LTDA. (two cases).

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

Argued Dec. 7, 1956.

Decided Jan. 21, 1957.

Rehearing Denied March 7, 1957.

Before Biggs, Chief Judge, Kalodner, Circuit Judge, and Kraft, District Judge.

Kraft, District Judge.

* * *

Appeals 11,993 and 11,994.

The two claims embraced in the action of the administratrix of Thomas' estate are based on separate Pennsylvania statutes: one upon the wrongful death statute [5] and the other upon the survival statute.[6] The administratrix challenges the district court's denial of recovery on the former, while Garcia disputes that court's allowance of recovery on the latter. The question thus posed is whether the federal maritime law or the substantive law of Pennsylvania governs each of this plaintiff's two claims.

Under the general maritime law there is no right of recovery of damages for death resulting from a maritime tort. In Klingseisen v. Costanzo Transp. Co., 3 Cir., 1939,

5. Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601. Act of April 26, 1855, P. L. 309, § 1, Act of June 7, 1911, P. L. 678, § 1, Act of April 1, 1937, P. L. 196, § 1, 12 P. S. § 1602.

6. Act of April 18, 1949, P. L. 512, art. VI, §§ 601, 603, 20 P. S. §§ 320.601, 320.603.

101 F. 2d 902, the appellant's claim was based on the same wrongful death statute upon which the present plaintiff relies for one of her claims. We there held that, while jurisdiction existed because of that statute, the right to maintain the suit could be enforced in admiralty only in accordance with the substantive law of Pennsylvania, which barred recovery on the ground of the decedent's contributory negligence. In the H. S. Inc., No. 72, 3 Cir., 1942, 130 F. 2d 341, adhering to our decision in Klingseisen, we held that the rights of the parties were controlled by the substantive law of New Jersey.

Contributory negligence of the deceased is established in the present case. The administratrix urges, therefore, that both her claims should be resolved under the humane comparative negligence doctrine of maritime law, while Garcia contends that both claims should be governed by substantive state law, which bars recovery.

Had Thomas survived, his right of action arising from this alleged maritime tort would have been determined under maritime law. Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143. However, we do not construe certain of the language[7] in that case, as does O'Leary v. United States Lines Company, 1 Cir., 1954, 215 F. 2d 708, to mean that the principles of general maritime law are to be applied when jurisdiction is invoked to enforce a right created by a state wrongful death statute.

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7. 346 U. S. 406, at pages 409, 410, 74 S. Ct. at page 205: "True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in its substantive as well as its procedural features * * *' Panama R. Co. v. Johnson, 264 U. S. 375, 386, 44 S. Ct. 391, 393, 68 L. Ed. 748. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." (Footnotes omitted.)

Hawn had a right of action, independent of any Pennsylvania law, because his injury resulted from a maritime tort and was not fatal. Here, the injuries were fatal and neither the administratrix nor those for whose benefit her claim under the wrongful death statute is asserted had any right of action, under maritime law, to recover damages for the decedent's death, even though it resulted from a maritime tort. She did not seek to enforce any maritime right by a state created remedy.

No right of action existed in Pennsylvania, in or on behalf of the next of kin of a decedent whose death resulted from a tortious act, prior to the enactment of this wrongful death statute. That this statute created a new right of action, not for the injury to the deceased, but for the injury to those who suffered loss by reason of the death, is clear from the language of the Pennsylvania Supreme Court in Pezzulli v. D'Ambrosia, 1942, 344 Pa. 643, at page 647, 26 A. 2d 659, at page 661:

> This action "* * * represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to *them* through deprivation of the part of the earnings of the deceased which they would have received from him had he lived." (Footnotes omitted.)

It is significant that Justice Black, who delivered the opinions both in Pope & Talbot, Inc. v. Hawn, supra, and in Garrett v. Moore-McCormack Co., Inc., 1942, 317 U. S. 239, at page 245, 63 S. Ct. 246, at page 251, 87 L. Ed. 239, said, in the latter case:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection *for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.* Not so long ago we sought to achieve this result with re-

spect to enforcement in the federal courts of rights created or governed by state law. *And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.*" (Emphasis supplied; footnotes omitted).

The test is whether the right is one rooted in the general maritime law or one rooted in the state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which that right originated. This plaintiff, in seeking recovery under the wrongful death statute, undertakes the enforcement of a right which is neither rooted in nor recognized by the maritime or the common law, but is wholly state created. There was sufficient evidence to submit to the jury the issue of the decedent's contributory negligence and the district court correctly decided that the plaintiff's claim, which was based on the Pennsylvania wrongful death statute, was governed by the law of that state and was therefore barred by the decedent's contributory negligence.

The plaintiff's claim under the survival statute rests on a different foundation. In Pezzulli v. D'Ambrosia, *supra;* the Pennsylvania Supreme Court, referring to an action under the survival statute, said:

> This "* * * is not a new cause of action at all, but merely continues in his personal representative the right of action which accrued to the deceased at common law because of the tort; the damages recoverable are measured by the pecuniary loss occasioned to *him*, and therefore to *his estate*, by the negligent act which caused his death."

In the present case, under maritime law, death abated the right of action which accrued to Thomas thereunder

for the injury he suffered in this maritime accident. The effect of the state statute is merely to preserve Thomas' right of action and to continue it, unabated, in his administratrix. No new right is created. An existing right is preserved and a remedy afforded for its enforcement. Since the right preserved here is one rooted in maritime law, the district court properly applied the maritime rule of comparative negligence under which the decedent's contributory negligence was no bar to plaintiff's claim under the survival statute.

The judgments of the district court will be affirmed.